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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

Request of Century Communications Corp. For Stay of Effective Date Pending Reconsideration or, in the Alternative, Judicial Review

August 2, 1993

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Request for Stay

On May 3, 1993, the Federal Communications Commission ("Commission") issued its Report and Order ("Order"), containing cable television rate regulations. The Order violates express

The Order promises to have a devastating impact both on cable operators and on the consumers it is supposed to protect. It

Indeed, Chairman Quello candidly admitted that the Commission was buckling under to political pressure:

> If I were free to set the effective date of

Congressional source has financial leverage on the involved agency").[3]

For many cable operators, including Century, the Order's benchmark rates are devastating. If forced to adopt benchmark rates:

> Many cable operators will generate revenues well below their operating expenses, preventing them from servicing existing debt or attracting new capital. [Gallagher Decl. ¶¶ 6, 8; Declaration of David D. Kinley ("Kinley Decl.") ¶¶ 6-7; Declaration of D. Jack Stock ("Stock Decl.") ¶¶ 5-6; Declaration of Stanley M. Searle ("Searle Decl.") ¶¶ 5-6; Declaration of Gilbert R. Clark, Jr. ("Clark Decl.") pp. 1-2; Declaration of Ralph J. Morrow, Jr. ("Morrow Decl.") ¶ 4; Declaration of W. Robert Felder ("Felder Decl.") ¶¶ 7-8; Declaration of Victor S. Falk, III ("Falk Decl.") ¶ 4]
>
> Some cable operators may be forced out of business or into bankruptcy. [Searle Decl. ¶¶ 5-7; Clark Decl. pp. 2-3; Felder Decl. ¶¶ 8-10]
>
> Other cable operators will be unable to finance planned expansion and equipment upgrades, to consumers' detriment. [Kinley Decl. ¶ 9; Stock Decl. ¶¶ 6-7; Searle

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[3] See also D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246-48 (D.C. Cir. 1971) (invalidating agency action that was admittedly determined in part by a Congressional threat that, absent agency action, an appropriation would not be forthcoming), cert. denied, 405 U.S. 1030 (1972).

Decl. ¶ 6; Clark Decl. pp. 2-3; Morrow Decl. ¶ 6; Felder Decl. ¶¶ 11-12; Falk Decl. ¶¶ 5-6]

Still others will be forced to discontinue cable service altogether in unprofitable areas. [Declaration of Arizona Cable TV Association ("ACTA Decl.") ¶ 10; Searle Decl. ¶¶ 6-8; Felder Decl. ¶ 13]

These irreparable, adverse consequences to cable operators and consumers can and should be avoided by granting Century's stay request.[4]

II. CENTURY IS ENTITLED TO A STAY.

Century is entitled to a stay under the Commission's four-

A. Century Is "Likely to Prevail" on the Merits and, In Any Event, Has Presented a "Substantial Case."

an adequate statement of its "basis and purpose" [Petition at 15-22].[5]

But even if the Commission believes that Century is not "likely to prevail," a stay should be granted because the other three factors strongly favor a stay and Century's petition raises a "substantial case on the merits." Washington Metropolitan Area Transit Comm'n, 559 F.2d at 843 (where "the other three factors strongly favor interim relief," movant need only make a "substantial case on the merits").

B. Century Will Suffer Irreparable Harm Absent a Stay.

Century will be irreparably harmed by the Order in at least three ways--any of which, independently, warrants a stay.

1. The benchmark rates could preclude Century from covering its operating and capital expenses, and will result in substantial, unrecoverable losses absent a stay.

a. Century and other cable companies will face substantial, unrecoverable losses absent a stay.

Adoption of benchmark rates will cause Century severe and irreparable financial loss. Even before the Order was issued, Century's cable systems were not earning a net profit. Adoption of the benchmark formula will require Century to lower the rates of its cable systems up to 15%, resulting in an aggregate additional loss of revenue of approximately fifteen to thirty

[5] Additional problems with the Order have been raised by other parties' petitions for reconsideration, and these petitions additionally support the substantial probability that the Order

million dollars annually. [Gallagher Decl. ¶¶ 4-5] This is an irreparable loss: these revenue losses cannot later be recouped--either from the Commission or from consumers--if the Order ultimately is set aside. With those projected losses, Century could generate insufficient income to cover all of its operating and capital expenses. [Gallagher Decl. ¶ 6][6]

Indeed, with respect to one of its systems, implementation of the benchmark rates could provide insufficient income to permit that system to comply with loan covenants on a $68.5 million obligation. [Gallagher Decl. ¶ 7] Default on loan covenants could damage Century's banking and credit relationships, and could adversely affect its ability to obtain future financing and attract capital investment. [Gallagher Decl. ¶ 8; see Letter of First Union National Bank et. al, to James H. Quello, dated 6/21/93 and filed with Commission 6/23/93, at 2-3 ("[t]he Cash Flow reductions resulting from the Report and Order threaten to place many cable system operators in default of bank and insurance company loan agreements since most of these agreements contain

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[6] Many of Century's cable systems have agreements with local franchise authorities requiring expansion of service to additional subscribers on specified timetables, or requiring future service upgrades to increase the quality and number of channels within specified dates. Some of these franchise agreements also require Century to make additional public, educational or governmental access channels and other payments ranging up to $375,000. The imposition of benchmark rates will limit future revenues, and compliance with these franchise obligations will result in even further losses to Century. [Gallagher Decl. ¶ 9]

financial covenants based on Cash Flow;" "new bank financing will be inaccessible to most cable operators")]

Additionally, the benchmark rate, because it is based upon rate structures developed in an unregulated market, does not permit recovery of the substantial costs of regulation, such as: (i) the customer service costs that will be incurred in the transition; (ii) the cost of compliance, including engaging outside consultants and experts; (iii) the cost of implementing the regulations, including any necessary changes in program offerings, tiering and marketing; and (iv) increased cost of capital associated with a regulated market. [See Gallagher Decl. ¶ 6] Those expenses cannot later be recouped if the Order ultimately is set aside. Because most franchisors do not have municipal or administrative procedures in place, the delays (and costs) likely to be encountered in implementing the regulations are substantial. [See Gallagher Decl. ¶ 11]

Other cable companies, like Century, also face irreparable harm to their businesses if forced to adopt benchmark rates. For example, one cable operator with 12,000 subscribers and cumulative system losses in excess of $1.6 million even <u>before</u> any rate reductions reports that "[t]he revenues we calculate we would receive under the benchmark rates are insufficient to cover our current costs of doing business" and "would make it impossible" to "service . . . existing debt as it is now structured." [Stock Decl. ¶¶ 5-6] Under benchmark rates, Wometco Cable Corp. would lose estimated revenues of "approximately $2 million per month," causing "predicted cash flow [to] fall to a level that probably will cause [its] cable companies to be in breach of their loan covenants." [Falk Decl. ¶¶ 4, 6] Similarly, Pacific Sun Cable Partners, L.P. "would be required to reduce its current rates in the System by about 26.4%, resulting in an annual revenue loss of approximately $97,320, or approximately 20.6%," and the resulting "cash flow reduction would make it impossible for the System to service its pro rata share of existing debt." [Kinley Decl. ¶¶ 6-7]

The results for other cable systems are similar. Many cable companies servicing thousands of subscribers would suffer huge and irreparable losses if the benchmark rates are adopted. The result will harm customers, because the cable companies will find it impossible to raise capital to expand and improve services (and in some cases, even to continue existing services). See, e.g., Morrow Decl. ¶ 4 ("The projected cash flow reduction would make it very difficult for Catalina Cable to service its existing debt and would probably prevent it from obtaining further financing necessary to expand and upgrade cable service to subscribers"); Searle Decl. ¶¶ 4-7 (benchmark would require 26% rate reduction; Because projected cash flow would be "insufficient to maintain operations," company would not be able to continue providing service to 157 subscribers in rural area); Falk Decl. ¶¶ 4, 6 (benchmark rates would require Wometco to reduce rates "to a level we believe is confiscatory"; "[t]he rate reduction and loss of revenues . . . would seriously impede our ability to make improvements in our facilities and services"); ACTA Decl. ¶¶ 7-10 ("The ability of ACTA's member organizations to service existing debt and obtain working capital loans will be substantially impaired if benchmark rates are adopted"; "Many small system members of ACTA have indicated that they will find their businesses in jeopardy if they have to continue with 'benchmark' rate").[7]

These unrecoverable financial losses--which for Century alone amount to tens of millions of dollars--constitute irreparable injury. Courts recognize that financial injury is irreparable when the money lost cannot be recouped. See American Pub. Gas Ass'n v. Federal Power Comm'n, 543 F.2d 356, 358-59 (D.C. Cir. 1976) (staying rate order where it was unlikely that excess payments under new rate would be recoverable through refunds if order was overturned), cert. dismissed, 429 U.S. 1067 (1977).

b. The "cost of service" option will not prevent the irreparable injury to Century and other cable operators.

The so-called cost of service alternative does not alleviate the potential harm faced by Century and other cable operators. The Commission--in violation of the Act--has failed to adopt cost

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[7] See also Letter of First Union National Bank et. al, to James H. Quello, dated 6/21/93 and filed with Commission 6/23/93, at 2-3 (the "benchmark rate structure . . . appears to disincent the operators from upgrading their cable plant;" under the proposed regulations, "many operators will have to defer investment in plant improvements . . . .").

of service regulations. [Petition at 12, 14-15][8] As a result, cable operators do not know, and cannot predict, what costs will be recoverable or what rate of return will be permitted. In these circumstances, a cable operator opting to make a cost of service showing runs the risk that its rates will be set at less than the already-confiscatory benchmark rates. [Gallagher Decl. ¶ 10; Kinley Decl. ¶ 10; Stock Decl. ¶ 8; Searle Decl. ¶ 9; Falk Decl. ¶ 6] Further, the uncertainty over the cost of service regulations will preclude cable operators from assuring lenders that they will have cash flow to service current and future financial obligations. [Stock Decl. ¶¶ 10-11]

Even when cost of service regulations are promulgated, the bifurcation of the regulatory process between the FCC and local franchising authorities would subject cable companies to inconsistent regulatory determinations that would result in material market dislocation. [Gallagher Decl. ¶¶ 10-11; Searle Decl. ¶ 9] And any cost of service showing before local franchisors will entail substantial time and expenses. Century estimates that each cost of service proceeding required to be undertaken before local franchisors will require Century to expend hundreds of thousands of dollars, with no assurance that such expenses ever would be recoverable. [Gallagher Decl. ¶¶ 10-11;

[8] While the Commission issued a Notice of Proposed Rulemaking on cost of service regulations on July 16, 1993, the reply comment date is September 14, 1993, which means that these regulations will not be final on September 1, 1993, when cable operators must elect whether to use the benchmark rate.

Stock Decl. ¶ 12] Many small operators would not be able to afford the professional services needed to make a cost of service showing. [ACTA Decl. ¶ 9] Thus, from Century's standpoint, the cost of service "option" is no option at all.

2. The threatened violations of Century's constitutional rights constitute irreparable harm.

The threatened violations of Century's constitutional rights if the Order goes into effect, standing alone, warrant a stay. The benchmark's failure to allow cable operators to earn a fair rate of return violates the Takings Clause of the Fifth Amendment. Additionally, the Commission's failure to promulgate cost of service rates leaves the Commission and franchising authorities unrestrained discretion in ruling on cost-of-service showings, in violation of due process and the First Amendment. See Petition at 9, 11-13 (Order violates the Takings Clause, due process, and First Amendment rights); Albro v. County of Onondaga, 627 F. Supp. 1280, 1287 (N.D.N.Y. 1986) ("deprivation of constitutional rights constitutes irreparable harm per se"); Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

3. Century will suffer irreparable harm to its reputation and customer goodwill absent a stay.

The regulations will further harm Century and other cable

cable operators must make major changes to the service offered ("threatened loss of good will and customers" is irreparable harm); Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F. Supp. 525, 530 (E.D.N.Y. 1979) (threatened injury to business reputation is noncompensable and warrants injunctive relief).

C. The Public Interest Favors a Stay and There Are No Other Interested Parties That Will Incur Substantial Harm as a Result of a Stay.

The harm to cable operators outweighs any potential harm to subscribers from a short delay in the proposed rate reduction. Cable television rates have been unregulated for over seven years. An additional short delay will not cause substantial harm--particularly since consumers have benefited from a rate freeze that will continue until November 15, 1993.

More importantly, a stay is clearly in the public interest and in the interest of consumers. Compliance with the Order threatens to force some cable operators out of business, depriving some consumers of cable television altogether. [Searle Decl. ¶¶ 5-7; Clark Decl. pp. 2-3; Felder Decl. ¶¶ 8-10] Other cable directly contrary to the public interest behind the Act. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(3) ("It is the policy of the Congress in this Act to . . . ensure that cable operators continue to expand, where economically justified, their capacity and their programs offered over their cable systems").

III. RELIEF REQUESTED.

The Commission should stay the Order until it grants Century's Petition or, in the alternative, until judicial review is complete.

July 30, 1993.

Respectfully submitted,

BROWN & BAIN, P.A.

By ______________________

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List of Exhibits

1. Declaration of Bernard P. Gallagher
2. Declaration of David D. Kinley
3. Declaration of D. Jack Stock
4. Declaration of Stanley M. Searle
5. Declaration of Gilbert R. Clark, Jr.
6. Declaration of Ralph J. Morrow, Jr.
7. Declaration of W. Robert Felder
8. Declaration of Victor S. Faulk, III
9. Declaration of Arizona Cable TV Association

Declaration of Bernard P. Gallagher

1. I, Bernard P. Gallagher, am the President and Chief Operating Officer of Century Communications Corp. ("Century"). Century owns, operates and manages fifty-eight cable television systems that are subject to three hundred separate franchise agreements with local authorities in twenty-four states and in Puerto Rico. As of May 31, 1993, Century provides cable service to over 930,000 primary basic subscribers.

2. I am responsible for Century's overall operations, including its ability to service existing debt, meet and comply with various operating and financial covenants associated with such indebtedness, and attract the capital required to continue current levels of cable television service to subscribers. I am familiar with the contractual obligations of Century and its cable television systems under franchise agreements with local authorities and credit agreements with lenders and public debtholders.

3. At my direction, Century has analyzed how the Commission's proposed "benchmark" rates will affect its ability to continue to conduct its business. In particular, Century has assessed whether the proposed benchmark rates will permit it to earn a reasonable profit. Century also has studied whether it will be able to continue to meet its franchise and other contractual obligations, or continue to provide current levels of cable television service to subscribers, under the proposed benchmark rates.

4. <u>At the present time, even without any rate reductions</u>

[redacted]

on the level of service to its subscribers. Additionally, the benchmark rate, because it is based upon rate structures developed in an unregulated market, will not permit Century to recover the substantial costs of regulation, including customer service costs incurred in the transition, the cost of compliance with the regulations (including consultant and expert fees), costs of implementation (including costs associated with any necessary changes in program offerings, tiering and marketing), and the expected increased cost of capital associated with a regulated market.

7. Based on Century's present assessment with respect to one system (serving approximately 92,000 subscribers) in which Century holds an ownership interest, implementation of the benchmark rates could provide insufficient income to permit that system to comply with loan covenants for a $68.5 million outstanding obligation, risking a default.

8. Default on loan covenants caused by implementation of benchmark rates could damage Century's banking and credit relationships, and could adversely affect its ability to obtain future financing and attract capital investment.

9. In addition, many of Century's cable systems have agreements with local franchise authorities requiring expansion of service to additional subscribers on specified timetables, or requiring future service upgrades to increase the quality and number of channels within specified dates. Some of those franchise agreements also require Century to make additional public,

educational or governmental access channel and other payments ranging up to $375,000, which obligations will become due in late 1993 or succeeding years. The imposition of benchmark rates will limit future revenues, the expectation of which was the basis for those franchise agreement commitments. As a result, Century would be denied the opportunity to become profitable and would in fact incur even greater losses.

10. The so-called "cost of service" method does not alleviate the harm to Century of complying with the Order. The Commission has not yet released any proposed regulations for "cost of service" determinations. Therefore, Century cannot determine what costs may be recovered or what rate of return it can expect to obtain. Century and its lenders cannot gamble on the uncertain outcome of electing to initiate a "cost of service" proceeding when the rules or standards for measuring "cost" have not been developed, and the resulting rates might therefore lead to even greater losses than those projected under the benchmark formula.

11. Further, regulations provide that portions of Century's rate structure will be evaluated by different regulatory authorities, i.e., the local franchise authority for the basic tier and the Commission for all other levels of regulated service. Without specific guidelines and standards for evaluation, the results for the "cost of service" showing are subject to inconsistent results with regard to the same group of offerings to

result in material market dislocation. Such structure effectively

[redacted]

I declare under penalty of perjury that the foregoing is true and correct. Dated this 2nd day of August, 1993, in New Canaan, Connecticut.

Bernard P. Gallagher

Bernard P. Gallagher